



telemarketing calls on its behalf and that KAA made an automated call to Mr. Shelton's cellular phone in violation of the TCPA. *See* 47 U.S.C. § 227(b)(1)(A)(iii). The call was made despite the fact that Mr. Shelton had previously sued those same parties for that same conduct. Mr. Shelton alleges Direct Energy is vicariously liable for violating the TCPA. Because telemarketing campaigns generally place calls to hundreds of thousands or even millions of potential customers *en masse*, Mr. Shelton brings this action on behalf of a proposed nationwide class of other persons who received illegal telemarketing calls from Defendants.

**Defendant Direct Energy:** Mr. Shelton previously enrolled as a Direct Energy customer and sued Direct Energy and KAA Energy, a third-party telemarketing vendor, (*Shelton v. Direct Energy*, Case No. 1:19-cv-00081, in the United States District Court for the Southern District of Ohio) in relation to the enrollment call that KAA Energy placed to Mr. Shelton. Mr. Shelton later requested to be placed on a Do-Not-Call list. Not long after Mr. Shelton dismissed his case with prejudice, he received a second call from KAA Energy. Thereafter, Mr. Shelton's counsel alerted Direct Energy's counsel to the second call, and Direct Energy requested information from KAA Energy, as to why KAA Energy contacted Mr. Shelton again. KAA Energy acknowledged that it inadvertently dialed, Mr. Shelton, while testing its equipment in advance of the forthcoming stay-at-home order to combat the spread of COVID-19. Specifically, KAA Energy states:

We purchased a couple of laptops in anticipation of a stay at home order in Florida so we had some agents logging in these and testing them in the office. This particular agent was logged into one of these and accidentally logged into a campaign we just created that was not yet configured for proper dialing. Due to this fact the DNC features had not been set up for manual dialing. Since the testing was being done with manually dialed win backs Shelton's number from the previous opt-in was in that list. Due to the fact that he was in the wrong campaign in the dialer, it allowed him to dial it. Had he been in the correct campaign the number would have never been able to have been dialed from the system. We [Sic.] gone back and re-tested the system to ensure it is working properly and will continue doing so during these most unprecedented circumstances in our country.

Direct Energy provided KAA Energy's response to Mr. Shelton's counsel. Mr. Shelton then filed this putative class action. Direct Energy disputes any telemarketing violation occurred, that it can be vicariously liable for KAA Energy's conduct, or that the unique and limited circumstances of any errant call(s) warrant class certification.

Additionally, Direct Energy intends to file a motion to dismiss for lack of subject matter jurisdiction based on the Supreme Court's decision in *Barr v. AAPC*, 140 S. Ct. 2335 (2020), which held that the government-debt-collection exemption amendment to the TCPA was unconstitutional and thereafter severed the amendment. Because the TCPA was unconstitutional prior to severance, any purported violations that post-date the exemption amendment and pre-date *AAPC* are unenforceable. See *Creasy v. Charter Communications, Inc.*, CV 20-1199, 2020 WL 5761117, at \*5 (E.D. La. Sept. 28, 2020) ("The entirety of the pre-severance version of § 227(b)(1)(A)(iii) is void because it itself was repugnant to the Constitution before the Supreme Court restored it to constitutional health in *AAPC*.").

**Defendant KAA Energy: Has not made an appearance.**

### **III. Anticipated Scope of Discovery**

#### **A. Summarize those issues on which the Parties will need to conduct discovery.**

**Plaintiff's Position:** The Plaintiff anticipates that discovery will be needed on the requisites of Fed.R.Civ.P. 23 in order to support his anticipated motion for class certification as well as the merits of Plaintiff's TCPA claims, including the dialing system at issue and his vicarious liability theory, in order to prepare for trial, or to oppose any summary judgment motion that the defendant may file. Plaintiff sees no reason to stay discovery and will object to any such request.

**Defendant's Position:** Direct Energy asserts that discovery should be stayed until resolution of Direct Energy's forthcoming motion to dismiss on the basis that the Court lacks subject matter jurisdiction. Alternatively, Direct Energy will need discovery into Plaintiff's calling records and the circumstances under which KAA Energy called Plaintiff.

Agreed anticipated number of interrogatories per Party: 25

**B.** Agreed anticipated number of depositions per Party: Up to 10

**C.** To the extent either Party proposes to exceed the presumptive limits in the Federal Rules of Civil Procedure for discovery, explain the basis for that proposal. n/a

**D.** Do the Parties anticipate the need for experts? If so, identify the subjects on which the expert(s) may opine.

The Plaintiff may need an expert witness to identify the telephone numbers that are in his putative class definition and to opine on the dialing system at issue.

#### **IV. Status of Discovery**

Discovery has yet to commence.

#### **V. Proposed Case Management Deadlines**

Deadline to serve initial disclosures under Rule 26(a)(1): **November 11, 2020**

Deadline to amend pleadings to add claims or Parties: **January 29, 2021**

Deadline to complete discovery: **August 31, 2021**

Deadline for affirmative expert reports (if any) and disclosure of lay witness opinion testimony with related information and documents (if any): **September 27, 2021**

Deadline for rebuttal expert reports (if any): **October 30, 2021**

Deadline to File Motion for Class Certification: **November 22, 2021**

Deadline to file motion for summary judgment:

**60 days after ruling on  
Plaintiff's motion for Class  
Certification**

**VI. Electronic Discovery**

The Parties anticipate agreeing to an ESI Stipulation.

**VII. Protective Orders and Confidentiality Agreements**

The Parties anticipate that a confidentiality protective order will be needed. Defendants will propose a Protective Order to Plaintiff.

**VIII. Alternative Dispute Resolution**

The Parties do not believe that alternative dispute resolution would be appropriate at this time.

**IX. Consent to Send Case to a Magistrate Judge**

The parties do not unanimously consent to proceed before a United States Magistrate Judge.

**X. Other Matters**

None at this time.

Dated: October 30, 2020

by:

/s/ Joseph F. Murray

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